MISCELLANY.

Knowledge of a Director as Knowledge of a Corporation.[1]—A meeting of the board of directors of a banking corporation has been called. Seven directors are present. The discount of a promissory note of a partnership with which the bank has had many similar transactions is before the board. The note has been signed by one of the partners on behalf of the firm as has been customary. But the fact that the partnership was dissolved prior to the affixing of this signature is known only to two of the directors, who make no mention of it in the meeting. These two directors, with intent to serve their own interests and in disregard of their duty to the corporation, vote in favor of the discount and two of the other directors vote likewise. The other three vote against discounting the note, but the discount is made. The bank now sues the other partners upon the note. Will it be charged with knowledge of the dissolution so as to bar its recovery?

In the above hypothetical case it will be noted that the directors having the knowledge of the dissolution (1) are engaged in corporate business at a board meeting, (2) do not comprise a majority of the directors present, but (3) their votes are essential to produce the corporate action of discounting the note.

There are various situations in which the knowledge of a director becomes a material issue, but which are distinct from the present problem. Suppose a director is acting, not as a member of the board, but as an agent of his corporation. What effect has his knowledge upon the corporation? The law is settled that a corporation is responsible to the same extent as a natural principal for the acts of its agents, including improper acts, done in the scope of the agency.[2] An agent's knowledge of facts concerning any transaction done in the scope of the agency should be treated as his acts are treated, and a principal, corporate or natural, should therefore be bound by it.[3] But courts have developed an exception to such a general rule where an interest of the agent "adverse" to his principal is shown and have refused to impute knowledge in such case.[4] When the effect of an agent's acts are in controversy as between the principal and third persons the fact that the agent has acted improperly or adversely towards his principal does not protect the principal, provided the act

[1] For a discussion of this subject, which has received scant attention in legal periodicals, see U. M. Rose, "Notice to Directors—How Far Binding on a Corporation," 6 SOUTH. L. REV. 45; Edwin G. Merriam, "Notice to Corporations," 6 SOUTH. L. REV. 793.

[2] The N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30; See Ranger *v.* Great Western Ry. Co., 5 H. L. Cas. 71, 86.

[3] See 2 MECHEM, AGENCY, 2ed., § 1822; WHARTON, AGENCY, § 184.

[4] American Surety Co. *v.* Pauly, 170 U. S. 133. See 4 FLETCHER, CYC. CORP., § 2243; 2 MECHEM, AGENCY, 2 ed., § 1815.

was within the scope of the agency.[5] Why should a different rule prevail when the effect of an agent's knowledge is in dispute? The misleading nature of the word "adverse" may be the answer. In the majority of cases where the agent is said to be acting "adversely," it will be found that he is acting for himself, and not for his principal, so that the act done cannot be considered as done within the scope of the agency.[6] Whether an act is within the scope of the agency depends not solely on the nature of the act, but also on the intent with which the act is done.[7] Thus, in Allen *v.* The South Boston R. R. Co.,[8] the plaintiff employed a stockbroker to purchase stock of the defendant corporation. The broker was treasurer of the corporation and had been intrusted with blank certificates of stock which he fraudulently and for his sole benefit sold to the plaintiff after all the capital stock had been issued. The defendant sought to have the knowledge of the broker imputed to the plaintiff but the court refused to do so on the ground that the acts of the broker were beyond the limits of his agency with the plaintiff. It is submitted that this is the correct test, whether the principal is a human being or a corporation, and that this is the only significance to be attached to the adverse interest of an agent.[9]

But when a director, who has not been delegated an agent with respect to the matter in question, is present at the meeting of the board when action is taken upon the matter, and does not communicate to the board the pertinent information which he has, will the corporation be charged with his knowledge? It is clear that the mere participation of one such director in the corporate action is cause for imputing his knowledge to the corporation provided such director did not withhold the information to serve a purpose of his own.[10] It is his duty to disclose to the board all facts pertinent to the matter before it,[11] and the corporation should have a remedy against him for violation of that duty. It will promote more intelligent corporate action if each director realizes that his failure to impart pertinent information will be a ground for charging the corporation. Such a rule does not make the conduct of corporate business too

[5] North River Bank *v.* Aymar, 3 Hill (N. Y.), 262 (1842); Limpus *v.* London General Omnibus Co., 1 H. & C. 526; Howe *v.* Newmarch, 12 Allen (Mass.), 49. See HUFFCUT, AGENCY, 2 ed., §§ 153, 157.

[6] Platt *v.* Birmingham Axle Co., 41 Conn. 255; Frenkel *v.* Hudson, 82 Ala. 158, 2 So. 758; Indian Head Nat. Bank *v.* Clark, 166 Mass. 27, 43 N. E. 912; American Surety Co. *v.* Pauly, *supra.*

[7] Illinois Central R. R. Co. *v.* Latham, 72 Miss. 32, 16 So. 757.

[8] 150 Mass. 200, 22 N. E. 917.

[9] See 2 MECHEM, AGENCY, 2 ed., § 1822.

[10] Nat. Security Bank *v.* Cushman, 121 Mass. 490 (1877). See 4 FLETCHER, CYC. CORP., § 2232. *Cf.* STORY, AGENCY, 9 ed., § 140, b.

[11] Union Bank *v.* Campbell, 4 Humph. (Tenn.) 394. See Edwin G. Merriam, "Notice to Corporations," 6 SOUTH. L. REV. 793, 811.

risky, for a director will rarely[12] fail to impart pertinent information unless he has a purpose of his own to be served.

Some courts have held that the corporation is likewise to be charged with the knowledge of a single director, acting in a board meeting, even when he has withheld his information to serve a purpose of his own.[13] Although an agent's adverse interest may remove his acts beyond the scope of the agency, it would seem that a director is acting as a director, whatever his motives, when he votes at a board meeting. But, it is submitted, this rule is too severe when the single director was not essential to produce the directorate action.[14] For it charges the corporation with knowledge of a non-essential minority in cases where we may be sure the pertinent information will not be revealed to the rest of the board.

But if the corporation is seeking to assert some right or title which it would not have obtained without the action of its directors, then the corporation ought to be charged with the knowledge of any single director, whose vote was essential to the directorate action, even if the director so voted, with intent to serve his own interests and in disregard of the interests of the corporation.[15] And this should be the law, even if there is no precise analogy from the law of agency; for the relation of a corporation to those human beings in whom are vested the powers of management is a closer relation than that between one human being who is a principal and another human being who is an agent. It would follow that, in the hypothetical case put at the opening of the note, the corporation should be charged with knowledge of the dissolution of the partnership, because the vote of the two directors who acted improperly was essential to bring about the discount. *A fortiori*, the corporation would be charged with knowledge possessed by the majority of the directors, even if they did not disclose it to the minority, and acted

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[12] The scarcity of cases involving such a situation is not surprising and seems convincing.

[13] Bank of United States *v.* Davis, 2 Hill (N. Y.), 451. See 1 MORSES, BANKS AND BANKING, 3 ed., § 134. *Contra*, La. State Bank *v.* Senecal, 13 La. 525 (1839); Terrell *v.* The Branch Bank at Mobile, 12 Ala. 502; Custer *v.* Tompkins County Bank, 9 Pa. St. 27. *Cf.* Shattuck *v.* Guardian Trust Co., 145 App. Div. 734, 130 N. Y. S. 658.

[14] Though many courts recognize this and do not impute a director's knowledge to the corporation, the reason given is that he was acting "adversely" and hence that knowledge of the corporation will not be presumed. Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282; Home Building & Loan Ass'n *v.* Barrett, 160 Mo. App. 164, 141 S. W. 723. This overlooks the fact that all corporate action must, in the nature of things, be vicarious and that the problem is to determine when it is proper to hold a corporation for the acts, omissions, or knowledge of human beings.

[15] Mercier *v.* Canonge, 8 La. Ann. 37. See 1 MORSE, BANKS AND BANKING, 3 ed., § 112 (6).

with intent to serve their own interests and in disregard of the interests of the corporation.[16] The converse situation is illustrated by the recent case of Western Securities Co. *v.* Silver King Consolidated Mining Co.,[17] where the votes of the two directors who were acting to serve their own fraudulent scheme comprised only a minority and were not essential to produce the directorate action. Their knowledge was properly held not to be imputed to the corporation.—*Harvard Law Review.*

Master and Servant—Servant's Assumption of Risk of Master's Breach of Statutory Duty.—The question as to whether a servant can assume the risk of injury caused by the master's failure to take precautions required by the statute for his protection was recently decided in Virginia. In Carter Coal Co. *v.* Bates [1] it was held that a mine employee, by continuing to work in a mine with knowledge of the employer's failure to provide for the carrying of a conspicuous light on the front of every trip or train of cars, as required by statute, did not assume the risk of injury from such breach of duty. Prior to the decision of this case this question was an open one in Virginia. Although raised in an earlier case,[2] the court held that it was unnecessary to decide the question.

As to whether the effect of a statute imposing duties on a master abolishes by implication the defense of assumption of risk, the authorities are in serious conflict, the jurisdictions being wellnigh equally divided on the question.[3] Without attempting any review of the authorities it may be of interest on a matter of such practical importance and effect, to note a few of the leading authorities on both sides of this question.

Among, others, the States denying that the assumption of risk is abolished by such statutes are New York,[4] Massachusetts,[5] Iowa,[6] and Rhode Island.[7] In some of the Federal courts, where the question has been considered as one of general law and not as a question on which such courts were required to follow the decisions of the courts of the States in which and under the statutes of which the

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[16] See Lyne *v.* Bank of Kentucky, 5 J. J. Marsh. (Ky.) 545, 559.
[17] 192 Pac. 664 (Utah).
[1] 105 S. E. 76. See ante; p.—
[2] Virginia Iron, Coal and Coke Co. *v.* Asbury's Adm'r., 117 Va. 683, 86 S. E. 148.
[3] For a review of decisions, Note, 6 L. R. A. (N. S.) 981.
[4] Knisley *v.* Pratt, 148 N. Y. 372, 42 N. E. 987, 32 L. R. A. 367.
[5] O'Maley *v.* South Boston Gaslight Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161.
[6] Martin *v.* Chicago R. I. & P. R. Co., 118 Iowa 148, 91 N. W. 1034.
[7] Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910.

actions respectively arose, the doctrine is also denied.[8] These decisions are based on the reasoning that the doctrine of assumption of risk does not depend upon *contract* relation between master and servant but is an old, established principle of the common law, *volenti non fit injuria*, and must be repealed, if at all, by a clear expression of intention on the part of the legislature. In the leading case of Denver & R. G. R. Co. *v.* Norgate,[9] the court said:

"The law regarding the assumption of risk is the law which governs the relation of master and servant, and is independent of the will of either. It is not a term of the contract of employment. If it were then the master and servant could retain it or abolish it in each contract of employment. But they can do neither. It is a principle of the common law, and must be repealed, if at all, by the lawmaking power."

On the other hand there is a considerable list of cases in several States which have adopted the contrary doctrine, denying that a servant can assume the risk of injury caused by the master's violation of a statutory regulation for the servant's protection. Among the States in which this doctrine prevails are Illinois,[10] Indiana,[11] Michigan,[12] and Missouri.[13] This view is also held by some of the Federal courts.[14] Most of these decisions are based on the theory that the doctrine of assumption of risk is contractual and that to allow the servant to waive by contract, express or implied, the performance of the statutory duty of the master imposed for the protection of the servant would be to nullify the object of the statute.

While admitting that the opposing doctrine is not without some force and logic, it would seem that it is based on argument too refined and that the Virginia Court arrived at the sound and correct solution of the question, both on principle and well reasoned authority. The question discussed in many of the cases as to whether the doctrine of assumption of risk is based on contract or is a common law principle would seem to be immaterial. Granted that it is a common law principle, cannot the statute, if not expressly, by implication repeal it? Then the question to determine is whether the statute did not by *necessary* implication accomplish this. To arrive at a proper construction of a statute

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[8] Denver and Rio Grande Railroad Co. *v.* Norgate, 141 Fed. 247, 6 L. R. A. (N. S.) 981. *Contra.* See *post*, note 14.

[9] *Supra.*

[10] See Spring Valley Coal Co. *v.* Patting, 210 Ill. 342, 71 N. E. 371.

[11] Island Coal Co. *v.* Swaggerty, 159 Ind. 664, 65 N. E. 1026.

[12] Murphy *v.* Grand Rapids Veneer Works, 142 Mich. 677, 106 N. W. 211.

[13] See Bair *v.* Heibel, 103 Mo. App. 621, 77 S. W. 1017.

[14] Narramore *v.* Cleveland, C. C. & St. L. R. Co., 96 Fed. 298, 48 L. R. A. 68; Pocahontas Consol. Collieries Co. *v.* Johnson, 244 Fed. 368, Knapp, J., dissenting.

the purpose for which it was enacted and the evils which it was intended to abolish should be inquired into. The evident purpose of the enactment of such statutes is well expressed in Pocahontas Consolidated Collieries Co. *v.* Johnson. The question in this case arose under a violation of the same Virginia statute and under facts very similar to the Bates Case. Judge Woods in delivering the opinion of the court said:

"The primary and insistent necessity for their enactment is that men will work in mines and other dangerous places at the constant risk of death or injury whether such precautions are taken for their safety or not. The Legislature assumed that men will work in the mines without the protection of the required lights; otherwise the enactment would not have been necessary. In this case it is probable there was not a man less in the mines because of defendant's failure to provide the safeguard of a light on the front of moving cars. Hence the precautions which the Legislature regards obviously necessary to safety it places out of the domain of waiver by the employee or of contract, either express or implied, between the parties, and requires such precautions as a matter of public policy, under the sanction of penalties inflicted for failure to provide them."

If the conclusion as reached by the Virginia Court is not correct, then as truly said by Judge Sims, in delivering the opinion of the Bates Case, "the statute may be nullified and set at naught by the flagrant and systematic violation of it."—*Virginia Law Review.*

Mental Suffering of Deceived Treasure Hunter.—Miss Carrie E. Nickerson, a maiden lady of 45 and kinswoman of Burton and Lawson Deck, long since deceased, after consultation with a negro fortune teller as to the place of burial of supposed treasure by the deceased Decks, engaged the assistance of certain other parties, and spent a good deal of time at intervals for several months in digging on the premises of John W. Smith in search for the fortune.

It appears that Miss Minnie Smith, and a couple of gentlemen friends by the name of William or Bud Baker and H. R. Hayes, conceived the idea of themselves providing a "pot of gold" for the explorers to discover. They accordingly filled an old kettle or bucket with rocks and dirt, and buried it where it was expected the searchers would find it. A slip of paper was placed under the outer lid with directions that the vessel should not be opened for three days and that all the heirs should be notified.

When the supposed treasure was discovered it was tied up in a gunny sack, sent to a bank to be held for the time required by the directions in the note, and the heirs were notified. The bank officers being in some doubt as to what the kettle might contain and as to whether it ought to be well guarded, made a private examination and discovered the contents. They tied the treasure up again, but seem-

ingly forgot to put the string near the kettle, as it had been when deposited with them. Miss Nickerson secured the services of a judge with whom she was acquainted, who, with some of the heirs and some of those who had fixed up the joke, came to the bank to the opening ceremony. On the discovery by Miss Nickerson that the bag had seemingly been tampered with, or possibly, according to conflicting evidence, on discovery of the actual contents of the kettle, she flew into a great rage, threw the kettle cover at one of the bank officers, and endeavored to attack one of the jokers, declaring that she had been robbed. She subsequently brought action for the injuries sustained from mental suffering and humiliation. For some reason or other the case seems to have dragged along until after her death, when it was apparently revived by her heirs. Judgment was rendered for defendants in the lower courts, but was reversed by the Supreme Court of Louisiana on appeal, in an opinion by Judge Dawkins reported in 84 Southern Reporter, 37, under the title Nickerson *v.* Hodges.

The court said: "The conspirators, no doubt, merely intended what they did as a practical joke, and had no willful intention of doing the lady any injury. However, the results were quite serious indeed, and the mental suffering and humiliation must have been quite unbearable, to say nothing of the disappointment and conviction, which she carried to her grave some two years later, that she had been robbed.

"If Miss Nickerson were still living, we should be disposed to award her damages in a substantial sum, to compensate her for the wrong thus done; but as to the present plaintiffs, her legal heirs, we think that a judgment of $500 will reasonably serve the ends of justice. R. C. C. art. 2315."

The judgment was thereupon reversed, and the lower court directed to enter one for plaintiffs in accordance with the above holding.

Mixed Juries.—The pages of our esteemed contemporary the Lawyer and Banker are never dull. The following humorous comments on mixed juries are taken from the March-April number:

Ohio has busted forth with a lady judge to act as chaperon for mixed juries. Like all other institutions the law will have a ladies' day. After this, when the Pinks look for the woman in the case, they will find her right in the jury box slapping a verdict on a pound of chocolates. Or up in the judge's pavilion powdering her judicial look.

There will soon be frail judges, lingerie juries and flapper criminals. Man will be crowded right out of the crime wave, which will be intensely marcelled.

The supreme court will be a beauty parlor. Blackstone will be rewritten by Victor Herbert in High C so the soprano lawyers can dole out justice. Justice will be tempered with gossip and mercy with caramels.

The innocent shall suffer with the guilty and without them.

New verdicts will be handed down by the unfair sex. Justifiable bigamy. Premeditated alimony. Accidental honesty. He who seeks justice must come into equity with manicured hands. The Love Pirate will have a stout chance trying to vampirize a jury of twelve business rivals in the jury box.

Justice is a blindfolded woman in a Mother Hubbard wrapper, carrying an Indianapolis household scales in one hand and some kitchen cutlery in the other. Visitors' Day will be a big event when the bigamist stands before a jury of the superior sex. Heretofore, bigamists have been humanely sentenced to a life of indolence in a bachelor cell. Now, he will have to serve out his sentence with his forty wives and let them surround his weekly pay envelope like minnows snapping at wet bread.

The crowning hour of justice will be reached when the Lady-Next-Door stands before a jury of her neighboresses. Charge, compounding a delicatessen felony by cooking a hot meal for her husband on Saturday night. The co-ed jury will retire to the gossip chamber and come out with a verdict of twelve new secrets.

It is no more than correct that women should be entitled to share the mistakes of justice. The courts have been stag affairs for centuries, and woman has suffered in silence. Any woman who is condemned to silence suffers.

Against a jury and judge of ladies, the vamp criminal has a future like a bar room license. The ankle loses its argument, the dimple its powerful oratory, and the silk stocking its logic.

Right to Protection of Ankles.—The Lawyer and Banker gives the following account of a recent episode in a court having a mixed jury:

An Ohio judge has announced a new principle in the way of jurisprudence. He says women have a right to the protection of their ankles.

This matter was brought to judical attention when some three weeks ago Springfield, Ohio, putting in force the letter of the nineteenth amendment, called women for jury duty. As jurors some of the fair sex were found worthy and, after selection, those chosen were instructed to enter the jury box and harken to the evidence and the law as expounded by the court.

It was, however, quickly discovered that the jury box was not constructed to harmonize with the current styles as dictated by Paris and as only slightly attenuated by the more shrinking feminity of the Land of the Free. The jury box was in name only and the court soon began to notice that the courtroom assembly, from the court crier to the prisoner at the bar, was growing distrait and giving little heed to the progress of the trial. He next beheld several fair members of the jury blushing, as in the days of our grandmothers. Then,

by following the general slant of the courtroom's eyes, the court beheld!

It seems scarcelv consistent with judicial dignity to describe what it was he beheld, but it is enough to say that orders were given, and after court adjourned upholsterers with tapestry and brass headed tacks were busy draping and fastening.

Next morning when the court assembled and the jurors took their places a neat curtain surrounded the jury box, rising eighteen inches from the floor and cutting from cruel scrutiny the sector that had caused the inconvenience of the day before. One young jurorette, wearing a nifty blue velveteen suit and a pair of those open-work hose guaranteed silk all the way to the top, was seen to bite her lip with just a trace of suppressed petulancy at sight of the ankle curtain; but then you know those things cost from "$5 a pair and up!" as the merchants say in their advertisements.

The Ohio Law Bulletin commemorates the incident in the following verse:

There was a little lady,
Who had a little leg,
She sat upon the jury,
And this is what she said:
"Good Judge, it is quite certain,
We need an ankle curtain,
For the lawyers keep a'flirtin',
'Til I'm really quite afraid."

There was a grumpy Judge,
Who to the lady said,—
"The flirtation of the lawyer
Is mostly in his head;
That there should be a curtain,
Is probably quite true,
But who is doing the flirtin',
The lawyer-man, or you?"